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JOAN GOH PENN NEE v. INQUIRY COMMITTEE

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
STEPHEN CHUNG J
[CASE NO: BKI-13NCVC-2-10-2013]
4 MARCH 2015

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ADMINISTRATIVE LAW: *Judicial review – Application for – Inquiry Committee set up under Advocates Ordinance Sabah to hear complaints against advocate – Application to quash ruling made by Inquiry Committee – Preliminary objection against application – Whether preliminary findings of Inquiry Committee amenable to judicial review – Whether there was any legal or binding effect – Whether advocate's rights affected by findings – Whether advocate should have availed herself of specific remedies and procedures instead of resorting to judicial review – Whether application for judicial review premature and incompetent*

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The applicant was an advocate in Sabah. The respondent was set up under s. 17(ccc) of the Advocates Ordinance Sabah ('the Ordinance') to hear complaints made against the applicant. The applicant had acted for Amalan Cipta Sdn Bhd ('Amalan') in a suit against the District Councils in Sabah and the Sabah Government. The parties subsequently agreed to settle the suit by paying RM1,728,390.36 to Amalan. The applicant retained a sum of RM200,000 out of the settlement sum towards payment of costs. Subsequently, Amalan filed an originating summons ('OS') against the applicant for the return of the RM200,000. After the OS was dismissed in the High Court, the respondent held an inquiry hearing on the complaint made by Amalan against the applicant that she, *inter alia*, overcharged for the services rendered and that she unilaterally deducted the sum of RM200,000 and failed to pay the sum. The respondent proceeded to deliver its grounds of findings *ie* that proceedings be taken against the applicant. Dissatisfied, the applicant applied for judicial review pursuant to O. 53 of the Rules of Court 2012 to, *inter alia*, quash the ruling made by the respondent. The respondent raised preliminary objections to the said application for judicial review, one of which was that the preliminary findings of the respondent were not amenable to judicial review. The respondent submitted that the report consisted of mere findings and recommendations that did not bind the applicant. According to the respondent, the findings were not reviewable as the applicant's legal rights were not directly affected by the findings. The applicant, however, submitted that the respondent was a decision making body because it was empowered under r. 4(1) of the Advocates Inquiry Committee Rules 1988 to investigate and scrutinise complaints against an advocate and if upon examination and enquiry into such complaint, the respondent finds that the complaint had been *bona fide* and that there was a *prima facie* evidence that disciplinary proceedings should be taken against the advocate. Thus, the applicant submitted that her application fell squarely into a judicial review case.

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Held (dismissing application for judicial review):

(1) There was nothing in the Advocates Ordinance which suggests that the respondent has any power to make any decision which affects the legal rights of the applicant except the power to order any advocate or complainant to pay the costs of any proceedings before the Inquiry Committee under r. 4(2) of the Advocates (Inquiry Committee) 1988. The findings of the respondent in the enquiry into the complaint had no legal or binding effect and did not affect the rights of the applicant which would eventually be decided by a judge in the proceedings pursuant to ss. 12, 12A, 13 and 14 of the Ordinance. Merely because the respondent had made a finding that the complaint was *bona fide* and there was *prima facie* evidence that disciplinary proceedings should be commenced, it did not impose any sanction or penalty on the advocate. (paras 22 & 23)

(2) Notwithstanding the findings of the respondent, it is for the judge to decide in chambers having regard to the nature of the complaint, the facts and all relevant circumstances relating thereto whether the complaint was *bona fide* and whether there was *prima facie* evidence for the application to proceed for the disciplinary proceedings to be taken. If he rules to issue to the advocate to show cause, further proceedings shall be in open court. The respondent is not the disciplinary body or tribunal to investigate, punish or penalise an advocate against whom a complaint has been made. It has no such powers. The respondent had not commenced any proceedings against the applicant. In the proceedings, the advocate would have an opportunity of showing cause against such order. In that application, the advocate has the opportunity to challenge the legality, unreasonableness or correctness of the findings or decisions of the respondent. (paras 28 & 29)

(3) The Advocates Ordinance deals with rules in respect of ethics and accounts and the right and liability of an advocate. The Ordinance also sets out the procedure for disciplinary action to be taken and for remedies thereto. Where there are specific procedures and remedies provided in the Advocates Ordinance, which are equally convenient and effectual which are available to an advocate, he must avail himself or herself of these procedures and remedies. There were the alternative specific procedures and remedies available to the applicant instead of resorting to judicial review, in particular under the Advocates Ordinance which was specifically applicable to the legal profession in Sabah. The applicant had not availed herself to these specific procedures and remedies, had not pursued and had not exhausted these specific procedures and remedies as an advocate which she was bound to do so. Clearly, this application for judicial review was premature and not competent. (para 31)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Darshan Singh v. Farid Kamal Hussain [2004] 4 CLJ 410 CA ***(refd)***

Koh Mui Tee v. Chin Lee & Ors [2014] 1 LNS 966 CA ***(refd)***

Lee Mok Lan (f) v. Registrar of Titles, Selangor [1955] 1 LNS 48 HC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Re Application by Hamid Hassan; Hamid Hassan v. Returning Officer, Karak & Ors [1979] 1 LNS 87 HC ***(refd)***

Re Chua Ho Ann [1963] 1 LNS 109 HC ***(refd)***

Re Seah Pong Tshai [1992] 1 SLR 399 ***(refd)***

Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC ***(refd)***

Woon Kwok Cheng v. HR Hochstadt & Ors [1997] 4 CLJ 106 HC ***(refd)***

Legislation referred to:

Advocates (Practice & Etiquette) Rules 1988, r. 11
Advocates' (Inquiry Committee) Rules 1988, r. 4(1)(c), (2)
Rules of Court 2012, O. 53 rr. 2(4), 4(2)
Sabah Advocates Ordinance, ss. 12, 12A, 13, 14, 15, 17(cc), (ccc)

For the applicant - Maureen Lind (Joan Goh with her); M/s Goh & Assocs
For the respondent - Ho Kim Kong (Chung Jiun Dao with him); M/s Chung & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Stephen Chung J:

[1] This is an application for judicial review pursuant to O. 53 of the Rules of Court 2012 for the following orders:

(a) to quash part of the ruling made on 4 July 2013 by the respondent that the deduction aspect of the complaint is *bona fide* and *prima facie* evidence that proceedings be taken against the applicant;

(b) to quash part of the ruling of the respondent that the applicant to pay cost of RM800 to the respondent;

(c) a declaration that there is no breach of the Advocates Ordinance and/or misconduct on the part of the advocate in deducting the sum retained by the advocate in order to set off her fees;

(d) a declaration that the applicant as an advocate did not breach r. 11 of the Advocates (Practice & Etiquette) Rules 1988, the Advocates' Account Rules 1988 and s. 15 of the Sabah Advocates Ordinance;

(e) a declaration that part of the decision being the subject matter of this application is wrong in law and *ultra vires* the provisions of the Sabah Advocates Ordinance, Sabah Advocates Ordinance (Cap 2) Advocates (Practice & Etiquette) Rules 1988, the Sabah Advocates Ordinance (Cap 2) (Inquiry Committee) 1988 and Advocates' (Inquiry Committee) (Amendment) Rules 1988 and Advocates' Account (Amendment) Rules 2010; and

(f) for damages.

[2] Section 17(cc) of the Sabah Advocates Ordinance provides for rules regulating proceedings against any advocate who fails to comply with any rules made under this section. Section 17(ccc) establishes an inquiry committee and to make rules for regulating the hearing and investigation of matters before or by an inquiry committee. The applicant is an advocate in Sabah practising under the name of Messrs Goh & Associates. The respondent is the inquiry committee set up under s. 17(ccc) of the Advocates Ordinance Sabah to hear the complaints made against the applicant.

[3] Rule 4(1) of the Advocates' (Inquiry Committee) Rules 1988 (as amended) states as follows:

(a) to consider, examine, scrutinise or enquire into any complaint made against any advocate in his professional capacity by any person aggrieved by any action of the advocate or by the State Attorney General or Sabah Law Association;

(b) if upon examination and inquiry into such complaint, the inquiry committee is of the opinion that the same is frivolous and without merit and unsubstantiated, to dismiss the same without taking any further action unless directed otherwise by the State Attorney General;

(c) if upon examination and inquiry into such complaint, the inquiry committee finds that the complaint has been *bona fide*, and that there is *prima facie* evidence that disciplinary proceedings should be taken against the advocate under s. 12 or s. 12A of the Ordinance, to commence proceedings to apply for such order as the inquiry committee thinks fit under s. 13 of the Ordinance having regard to the nature of the complaint and all the relevant circumstances relating thereto.

[4] On the statement, affidavits and submissions filed, the applicant had acted for Amalan Cipta Sdn Bhd (Amalan) in a suit against the District Councils in Sabah and the Sabah Government. The parties subsequently agreed to settle the suit by agreeing to pay RM1,728,390.36 to Amalan and costs of RM124,800. The applicant retained a sum of RM200,000 out of the settlement sum towards payment of the costs.

[5] On 17 September 2009 Amalan wrote a letter to the respondent about the sum being retained by the applicant. On 18 June 2010 Amalan filed an Originating Summons No. K24-148-2010 against the applicant for return of

A the RM200,000 and that the costs be taxed within 30 days. The OS was dismissed on 2 March 2011. On appeal, the Court of Appeal dismissed the appeal on 17 May 2013.

[6] In the meantime the letter of complaint was given to the applicant on 29 June 2010. The applicant responded to the complaint on 6 July 2010.
B On 12 August 2011, after the OS was dismissed in the High Court, the respondent held an inquiry hearing on the complaint made by Amalan. The applicant raised a preliminary objection that the complaint did not disclose any breach of ethics by the applicant and that it should be dismissed. The inquiry committee directed the parties to put in writing the complaint and
C any objections to the complaint.

[7] Amalan filed the complaint dated 18 August 2011 against the applicant that she overcharged for the services rendered, that the applicant refused to tax the bills, she unilaterally deducted the sum of RM200,000 and failed to pay the sum. The applicant filed her preliminary objections dated
D 9 September 2011.

[8] During the inquiry hearing on 8 November 2011 the preliminary objections were dismissed on the basis that there was no necessity to specify the specific sections or rules breached by an advocate in a complaint and what was required is that the substance of the complaint be made clear. The
E inquiry committee then proceeded to hear the substance of the complaint and delivered its grounds of findings on 4 July 2013 (see exh. JG-22).

[9] In para. 22 of the statement the applicant averred that the respondent delivered its rulings as follows:

F (a) 1st issue : Preliminary objection raised by applicant relating to complainant seeking order of taxation.

Ruling : Preliminary objection not accepted as taxation is not within the jurisdiction of the inquiry committee. No double jeopardy as feared by the applicant.
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(b) 2nd issue : Refusal of applicant to adduce tax.

Ruling : Declined to deal with issue as it has already been brought up in proceedings in the High Court.

H (c) 3rd issue : Excessive fees charged.

Ruling : There was insufficient evidence adduced to make a *prima facie* finding of breach.

(d) 4th issue : Breach of Advocates' Account Rules.

I Ruling : Distinction between issue of retention of RM200,000 by applicant and deduction of RM200,000 toward fees.

Retention – Subject matter of proceedings in the High Court.

Deduction – Aspect of complain is *bona fide* and *prima facie* evidence that proceedings be taken against the applicant. A

(e) Cost : RM800 be paid by the applicant to the inquiry committee ie, the respondent.

[10] The respondent has raised the following preliminary objections to the application for judicial review: B

(a) the preliminary findings of the inquiry committee are not amenable to judicial review;

(b) the refusal and/or failure to make Amalan a party to the judicial review proceedings is contrary to O. 53 r. 4(2) of the Rules of Court 2012 and the judicial review proceedings ought to be dismissed; and C

(c) the issue raised relating to the dismissal of the applicant's objections on 8 November 2011 is out of time in that regard.

[11] The applicant and the respondent agreed that if the preliminary objections are allowed, these will dispose or decide the application for the judicial review. D

[12] On the first preliminary objection raised, the respondent submitted that the preliminary findings of the respondent are not amenable to judicial review. The respondent submitted that the findings were made under r. 4(1)(c) of the Advocates' (Inquiry Committee) Rules 1988 (as amended). The findings made were whether the complaint was *bona fide*, whether there was *prima facie* evidence that disciplinary proceedings should be taken against the applicant under s. 12 or s. 12A of the Advocates Ordinance and whether to commence proceedings to apply for such an order as the inquiry committee thinks fit under s. 13 of the Ordinance having regard to the nature of the complaint and all the relevant circumstances relating thereto. E F

[13] The respondent submitted that the inquiry by the respondent was not a disciplinary hearing or proceeding, at best the inquiry constituted preparatory steps to the taking of disciplinary proceedings. It submitted that there was a strong policy consideration that it was against public interest to allow the findings of the respondent to be challenged in courts. G

[14] The respondent submitted that it is trite that the purpose of an order for *certiorari* is to quash the legal effect of a decision. For a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision and that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy. The respondent submitted that the report consisted of findings and recommendations and being mere findings and recommendations, they do not bind the applicant. It submitted that the findings are not reviewable as the applicant's legal rights were not directly affected by the findings or that H I

A the benefits she has been permitted to enjoy have not been deprived of. Counsel for the respondent referred to authorities in support of its submissions: see *Re Chua Ho Ann* [1963] 1 LNS 109; [1963] 1 MLJ 193; *Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294; [1988] 3 MLJ 149; *Ahli-ahli Suruhanjaya*
B *Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490.

C **[15]** The applicant submitted that the respondent is different from the bodies established for a particular purpose and on ad hoc basis such as the tribunal referred to in the authorities cited above by the respondent in support of its contention that it is not amenable to judicial review.

D **[16]** The applicant submitted that the respondent is a decision making body because it is empowered under r. 4(1) of the Advocates' (Inquiry Committee) Rules 1988 to investigate and scrutinise complaints against an advocate and if upon examination and enquire into such complaint and the inquiry committee finds that the complaint has been *bona fide* and that there is a *prima facie* evidence that disciplinary proceedings should be taken against the
E advocate. The applicant submitted that her application falls squarely into a judicial review case.

[17] The applicant submitted that the findings of facts had adverse consequences on her integrity and standing as an advocate and a member of the Sabah Law Association. The applicant submitted that there are decisions
F where the circumstances of the case make it amenable to judicial review in particular when the matter in contention involves the right to earn a livelihood or where the livelihood of an applicant is affected: see *Re Seah Pong Tshai* [1992] 1 SLR 399; *Woon Kwok Cheng v. HR Hochstadt & Ors* [1997] 4 CLJ 106; [1997] 2 MLJ 795; *Darshan Singh v. Farid Kamal Hussain*
G [2004] 4 CLJ 410; [2005] 3 MLJ 502.

[18] Therefore the applicant submitted that the decision of the respondent is amenable to judicial review and should be set aside because (a) the decision of the respondent was not supported by any evidence and facts; (b) the respondent has failed to take relevant evidence into consideration when
H making its decision; (c) the respondent has failed to apply the relevant law to this case; (d) the respondent has acted *ultra vires* its powers; (e) that no reasonable tribunal or body similarly circumstanced as the respondent would have arrived at such a conclusion or drawn such an inference as the respondent that there was a *prima facie* evidence that disciplinary proceedings
I be taken against the applicant; (f) the respondent has failed to take into consideration relevant and undisputed facts in coming to the conclusion; (g) the respondent has arrived at the decision which was never the complaint; and (h) the respondent has acted against the law of natural justice.

[19] The respondent is a statutory body appointed under s. 17(ccc) of the Advocates Ordinance of Sabah. Although its proceedings are not open to the public unless it so directs, it is a public body exercising the powers, duties and functions bestowed upon it under the law. It is exercising a public duty. Its findings or decisions may adversely affect the advocate against whom a complaint has been made.

[20] Order 53 r. 2(4) of the Rules of Court 2012 provides that any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application. On the facts and circumstances of this case, the applicant has shown that she has a real and genuine interest in the legality of the decision made against her which adversely affected her: see *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145.

[21] The question is whether she is entitled to quash and set aside the decision of the respondent and for the declaratory orders based on the grounds which the applicant has submitted.

[22] There is nothing in the Advocates Ordinance which suggests that the respondent has any power to make any decision which affects the legal rights of the applicant except the power to order any advocate or complainant to pay the costs of any proceedings before the inquiry committee under r. 4(2) of the Advocates' (Inquiry Committee) Rules 1988. This order to pay costs is subject to the provisions of ss. 12, 12A, 13 and 14 of the Ordinance.

[23] The findings of the respondent in the enquiry into the complaint have no legal or binding effect and do not affect the rights of the applicant which will eventually be decided by a judge in the proceedings pursuant to ss. 12, 12A, 13 and 14. Merely because the respondent has made a finding that the complaint is *bona fide* and there is *prima facie* evidence that disciplinary proceedings should be commenced, it does not impose any sanction or penalty on the advocate.

[24] Pursuant to s. 12 of the Advocates Ordinance, any advocate may have his name struck off the roll of advocates, be suspended from practising in Sabah, be fined not exceeding five thousand ringgit, be censured or be awarded costs to or against him or his right to practise in Sabah withdrawn by order of a judge *inter alia* if he has been guilty of a breach of any rules made under para. (a), (b) or (c) of s. 17 provided that no such order shall be made until the advocate or person has had an opportunity of showing cause against such order.

[25] Section 13(1) states that proceedings to strike an advocate off the roll of advocates, suspend, fine, censure or award costs referred to in s. 12 shall be commenced by an application to a judge in chambers for a rule to issue to the advocate to show cause why he should not be struck off the roll of advocates, suspended, fined, censured or awarded costs, as the case may be.

Pursuant to sub-s. (3), an application under sub-s. (1) or sub-s. (2) may be made by the inquiry committee established pursuant to s. 17, or by any person aggrieved by any action of the advocate or person complained against. In the event of a rule being granted, further proceedings thereunder shall be in open court: see sub-s. (4).

[26] In the event of any advocate being struck off the roll, suspended, fined, censured or awarded costs against him, he shall be at liberty to appeal against the order to the Federal Court.

[27] Reading the provisions of ss. 12, 12A, 13 and 14 of the Advocates Ordinance and r. 4 of the Advocates' (Inquiry Committee) Rules 1988, the role of the inquiry committee is to consider, examine and enquire into a complaint against an advocate in his professional capacity. If it finds that the complaint is *bona fide* and there is *prima facie* evidence that disciplinary proceedings should be taken against the advocate, the inquiry committee is to commence proceedings to apply to a judge in chambers for such order.

[28] Notwithstanding the findings of the inquiry committee, it is for the judge to decide in chambers having regard to the nature of the complaint, the facts and all relevant circumstances relating thereto whether the complaint is *bona fide* and whether there is *prima facie* evidence for the application to proceed for the disciplinary proceedings to be taken. If he rules to issue to the advocate to show cause, further proceedings shall be in open court. The inquiry committee is not the disciplinary body or tribunal to investigate, punish or penalise an advocate against whom a complaint has been made. It has no such powers.

[29] The inquiry committee has not commenced any proceedings against the applicant. In the proceedings the advocate will have an opportunity of showing cause against such order. In that application the advocate has the opportunity to challenge the legality, unreasonableness or correctness of the findings or decisions of the inquiry committee. The judge in chambers may decide to set aside the findings of the inquiry committee.

[30] The Advocates Ordinance is to regulate the admission of persons as advocates and to make provisions for matters relating thereto including admission and enrolment as advocates, the right to practise in Sabah, the rules in respect of ethics and accounts and the right and liability of an advocate. The Ordinance also set out the procedure for disciplinary action to be taken and for remedies thereto. Where there are specific procedures and remedies provided in the Advocates Ordinance, which are equally convenient and effectual which are available to an advocate, he must avail himself or herself of these procedures and remedies.

[31] Therefore these are the alternative specific procedures and remedies available to the applicant instead of resorting to judicial review, in particular under the Advocates Ordinance which is specifically applicable to the legal profession in Sabah. The applicant has not availed herself to these specific

procedures and remedies, has not pursued and has not exhausted these specific procedures and remedies as an advocate which she is bound to do so. No explanation was given. No explanation was also given why she chose to apply for judicial review when these specific procedures and remedies are available and applicable to her: see *Lee Mok Lan (f) v. Registrar of Titles, Selangor* [1955] 1 LNS 48; [1955] 1 MLJ 97; *Re Application by Hamid bin Hassan; Hamid bin Hassan v. Returning Officer, Karak & Ors* [1979] 1 LNS 87; [1979] 2 MLJ 183; *Koh Mui Tee v. Chin Lee & Ors* [2014] 1 LNS 966; [2014] 6 AMR 107. Clearly this application for judicial review is premature and not competent.

[32] For the reasons given that the applicant must avail herself of the specific procedures and remedies enacted in the Advocates Ordinance instead of applying for the judicial review, there is no need for me to deal with the two other preliminary objections raised by the respondent. Therefore the application for the judicial review is refused and no order for costs in this application. Costs should be decided in the disciplinary proceedings.

[33] Last but not least, to be fair to both sides, there is no provision in the Advocates Ordinance or in the Rules to provide the time frame for the inquiry committee to commence the application for a rule to issue to the advocate to show cause. However, once the inquiry committee has made its findings that the complaint has been *bona fide* and that there is a *prima facie* evidence that disciplinary proceedings should be taken against the advocate, the application for such an order must be commenced as soon as possible. The parties concerned are entitled to a speedy hearing and the right to know the outcome of the proceedings which may adversely affected their rights and livelihood. Otherwise any delay or failure will unduly prejudice the parties, in particular the applicant in this case.

[34] Looking at the circumstances especially the passing of time, the inquiry committee has not commenced the proceedings under s. 13 of the Ordinance. It has delayed in doing so. It is obliged to commence the application as soon as possible once it has made the findings. It has ample time to do so. No explanation was given why it cannot do so and there was also no explanation for the delay. Therefore the inquiry committee is directed to commence the application in accordance with the Ordinance and the Rules within 30 days from today.